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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KUMHO TIRE COMPANY, LTD., ET AL.,
Petitioners,

v.

PATRICK CARMICHAEL, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

MARK S. MANDELL, ESQ.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President, The Association of Trial Lawyers of America

JEFFREY ROBERT WHITE, ESQ.*
1050 31st. St., N.W.
Washington, DC 20007
(202) 965-3500
Attorney for Amicus Curiae
**Counsel of Record*

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 50,000 members primarily represent persons seeking to vindicate their legal rights in personal injury tort actions, civil rights cases, and commercial litigation. All parties have given blanket consent to the filing of all amicus briefs in this case, in letters of consent filed with the Clerk of the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

The issues raised in this case are of overriding importance to trial practitioners and their clients. The admissibility of expert testimony is frequently crucial to whether aggrieved persons will have their day in court. Trial lawyers fully appreciate the need for reliability in courtroom evidence. Their experience also gives them a healthy respect for the ability of American juries to assess intelligently the weight and credibility of expert testimony.

ATLA's primary concern is that overly restrictive limitations keep potentially helpful expert testimony from the jury, whose responsibility as factfinder is mandated by the Constitution. Many of the arguments advanced for such limitations are unsupported and destructive attacks on the competence of juries. It is ATLA's view that the objective of the court's "gatekeeping" function is not to expand the judge's role, but to assist the jury in fulfilling its constitutional responsibility.

SUMMARY OF THE ARGUMENT

I. This case is chiefly about juries. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court outlined the judge's responsibility to ensure the reliability of expert testimony admitted under Fed. R. Evid. 702. But automatic, rigid application of the four factors discussed in *Daubert* does not meet this responsibility. This Court's opinion in *Daubert* clearly did not require that these factors be applied in every instance without regard to whether they are indicative of the reliability of the particular expert opinion. Such wooden application of the *Daubert* factors would exclude many types of expert testimony that are routinely admitted as helpful to the factfinder without enhancing reliability.

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amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

A judge's reliability inquiry under *Daubert* must necessarily examine the "fit" between the factors applied and the reliability of the proffered testimony. The district court's failure to consider whether the factors were actually indicative of Carlson's reliability constituted an abuse of discretion.

Cross-examination remains a vitally important means of ensuring reliability where the witness relies on personal knowledge and experience. In this case, objections that Carlson's expert opinion was unreliable did not focus on the underlying principle that causes of tire failure can be ascertained by visual inspection, but rather on Carlson's application of that principle, which could be probed through cross-examination and rebuttal.

II. A general guideline applicable to all expert testimony should look to the benchmark incorporated by Congress in Rule 702: Assistance to the finder of fact. The objective of the judge's reliability inquiry should be to ensure that the jury has what it needs to make an intelligent assessment of the weight and credibility of the expert's testimony. A judge should determine whether the basis for the expert's opinion is amenable to cross-examination, whether additional indicators of reliability would aid the jury in its evaluation, and whether other steps, such as special instructions and juror notetaking, might help the jury carry out its task. Exclusion of expert testimony should be the last, not the first resort.

III. Under the "assist the jury" guideline, relevant testimony from a qualified expert should be presumptively admissible, unless the opponent comes forward with substantial evidence that the expert's opinion is mere speculation or subjective belief. A presumption of admissibility is consistent with the liberal thrust of the Federal Rules and would minimize abuse. It also safeguards the constitutional right to trial by jury.

There is no factual basis for arguments that experts distort the truth for financial gain, that they possess a misleading "aura of infallibility" in the eyes of jurors, and that

jurors are simply not competent to deal with expert testimony. Empirical studies demonstrate that jurors are capable of understanding and intelligently assessing the weight and credibility of expert witnesses. Moreover, the justice system provides means of dealing with such problems directly, rather than by restricting all expert testimony.

Daubert does not require judges to be amateur scientists, nor to be professional jurors. Its purpose is to make them better judges.

ARGUMENT

I. THE TRIAL JUDGE'S GATEKEEPING FUNCTION REQUIRES FLEXIBLE INQUIRY INTO RELIABILITY, NOT RIGID APPLICATION OF THE DAUBERT FACTORS TO ALL EXPERT TESTIMONY.

This case is chiefly about juries. This Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has sparked a vigorous examination of the role of science in the courtroom. *See, e.g.*, Report of the 1997 Forum for State Court Judges, SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES iii (Roscoe Pound Foundation 1998); Development in the Law, *Confronting The New Challenges Of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1488 (1995). At the same time, the Court's decision has focused attention on the constitutional role of the jury. New empirical research has shed light on the competence of juries in dealing with expert testimony. Unfortunately, some have used the decision to engage in unfounded and destructive jury-bashing, often for the purpose of garnering support for legislative "reform" of tort law.

A. The District Court's Rote Application of the *Daubert* Factors Constituted Abuse of Discretion.

1. Daubert Does Not Require Judges To Apply Rigid Criteria For The Admissibility Of Expert Opinion.

Both parties in this case accept that *Daubert* gives the trial judge "some gatekeeping responsibility" to ensure that "scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. Their dispute focuses on the Court's "general observations," setting forth four factors that might bear on the judge's inquiry:

> 1. Whether the expert's theory or technique "can be (and has been) tested."
> 2. "[P]ublication (or lack thereof) in a peer reviewed journal."
> 3. The known or potential "rate of error."
> 4. A showing of "a particular degree of acceptance" within the relevant scientific community.

509 U.S. at 593-94.

The trial judge in this case ruled that under *Daubert* the court "must apply" these criteria regardless of whether the expert's opinion is based on scientific principles or personal experience. 923 F. Supp. at 1520. The district court did not explain how any of these factors made Carlson's testimony more or less reliable. The court concluded only that Carlson's testimony failed to satisfy the four factors and was thus inadmissible.

The court of appeals acknowledged that under Rule 702, "it is the district court's duty to determine if Carlson's testimony is sufficiently reliable and relevant to assist a jury." 131 F.3d at 1436. However, the court held that the trial judge erred in applying the *Daubert* factors to Carlson's testimony,

which the court found was based on personal knowledge and experience, rather than a scientific methodology.[2]

Petitioner would have this Court transform the *Daubert* factors into a rigid set of criteria for admissibility of all expert testimony, regardless of whether it is based on "scientific knowledge" or on the witness' personal knowledge and experience. Pet. Br. at 19, 32 & 35.[3]

Such a rigid approach is contrary to this Court's admonition in *Daubert* that the trial judge's inquiry "is a flexible one." 509 U.S. at 594. It would have been incongruous for the Court to rule that the Rules eliminated the rigid *Frye* test, only to impose a rigid four-part standard of its own. The Court stated that the suggested factors were "nonexclusive" and not intended to be "a definitive checklist or test." *Id.* at 593. Indeed, the Court expressly indicated that

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[2] ATLA does not understand the court's use of the phrases "outside the scope of Daubert" and "inapplicability of Daubert" to deny the judge's role in assuring reliability; the court was referring specifically to the application of the four Daubert factors. See 1434-35 & n.4.

[3] ATLA suggests that Petitioner's Brief in this case has not quite lived up to its advance billing. The court below held that the district court erred in applying the *Daubert* factors because Carlson's opinion was not based on scientific knowledge, but on his personal knowledge and experience. The Petition for Certiorari carefully laid out the division of authority among the circuits as to whether *Daubert* should apply to engineers whose testimony is based on technical or specialized knowledge, as distinguished from a scientific methodology.

In its merits brief, however, Petitioner's primary contention is much more narrow and fact-bound: That, contrary to the lower court's reading of the record, Carlson did indeed rely on a scientific methodology. [Pet. Br. at 28] Whether the Daubert factors might not apply to certain types of experience-based expert testimony, Petitioner concedes, is "an issue that need not be decided in this case." (Pet. Br. at 29)

In that neither party takes issue with the core holding of the court of appeals -- that the judge erred in applying the Daubert factors to expert opinion based on personal experience -- ATLA respectfully suggests that this case is not well-suited as a vehicle for the broad expansion of *Daubert* desired by many of Petitioner's supporting amici.

at least two factors should not be applied in every case. The 'publication or peer review' factor, for example, may not be probative of reliability where the technique or principle at issue is 'too particularized, too new, or of too limited interest to be published.'" *Id.* at 594. Additionally, a showing of "general acceptance" is permissible, but not required. *Id.*

A more faithful reading of *Daubert* was rendered by the Ninth Circuit on remand:

> We read these factors as illustrative rather than exhaustive; similarly, we do not deem each of them to be equally applicable (or applicable at all) in every case.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316-17 (9th Cir.), cert. denied, 116 S. Ct. 189 (1995).

2. Application of the Daubert Factors To All Expert Testimony Would Preclude Many Types Of Expert Testimony Viewed As Helpful To The Jury Without Enhancing Reliability.

Experts testify an estimated 40,000 times annually in civil and criminal cases. Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1231 n.348. These witnesses represent a wide spectrum of scientific, technical and other specialized knowledge. Rigid application of the *Daubert* factors would exclude much of this evidence without enhancing the reliability of expert testimony.

Many fields of knowledge simply do not employ experimental procedures to test or falsify hypotheses, nor do they determine error rates. Some are observational, continually refining theories to explain new data. The theory of evolution is an example. *See*, John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence*, 74 N.C.L. Rev. 1183, 1201-04 (1996).

Social sciences in particular "rely predominantly on retrospective observational studies rather than on controlled

experimentation, and do not necessarily meet the *Daubert* standard of falsifiability." Erica Beecher-Monas, *Blinded By Science: How Judges Avoid The Science In Scientific Evidence*, 71 Temp. L. Rev. 55, 69 (1998). Indeed, the aim of Karl Popper's discussion of "falsifiability," which *Daubert* cited in discussing the scientific method, was to distinguish "true" empirical science from such "nonscientific" pursuits as economics and psychiatry. Ronald J. Allen, *Expertise and the Daubert Decision*, 84 J. Crim. L. & Criminology 1157, 1172 (1994).

Engineering, law, and accounting are other areas that require specialized training but are not "scientific" in approach and method. See Edward J. Imwinkelried, *The Next Step After Daubert : Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 Cardozo L. Rev. 2271, 2278-79 (1994). Indeed, as one of Petitioner's supporting amici points out, epidemiology, which figured heavily in the *Daubert* case itself, would not pass muster under the *Daubert* factors. Amicus Brief of American Tort Reform Association at 20-21.

A related type of expert opinion is that of a qualified member of a profession concerning the standard of care in a malpractice case. *See, e.g., Carroll v. Morgan*, 17 F.3d 787, 789 (5th Cir. 1994), reh'g denied, 26 F.3d 1117 (5th Cir. 1994) (board-certified cardiologist testified as to the standard of medical care for a cardiologist).

Courts frequently permit experts in the forensic sciences to present identification testimony. It would be virtually impossible to test the proposition that, for example, no two fingerprints are alike. It has been pointed out that many of the techniques, such as fingerprinting, ballistics, and handwriting analysis, have never empirically demonstrated their ability to make unique identifications. *See* Margaret A. Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 Minn. L. Rev. 1345, 1354-55 (1994); Michael J. Saks & Jonathan J. Koehler, *What DNA "Fingerprinting" Can Teach*

the Law About the Rest of Forensic Science, 13 Cardozo L. Rev. 361, 362 (1991). Nevertheless, expert opinions based on these techniques are routinely admitted. *See, e.g., United States v. Jones*, 107 F.3d 1147, 1157 (6th Cir. 1997) (handwriting analysis could not meet *Daubert* standards, but was nonetheless admissible as specialized knowledge helpful to jury); *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1046-47 (S.D.N.Y. 1995)(same).

Other areas of knowledge are primarily interpretive. Language interpreters, of course, testify as experts. Fed. R. Evid. 604. Other uses of language may require interpretation. *See Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1375 (8th Cir. 1977)(expert testimony admissible to interpret complex technical construction specifications). Prosecutors frequently make use of witnesses who can interpret jargon used by criminal organizations. *E.g., United States v. Williams*, 81 F.3d 1434, 1442-43 (7th Cir. 1996) (testimony by a former gang member concerning how to translate the gang's code.); *United States v. Castiello*, 915 F.2d 1, 4-5 (1st Cir. 1990), cert. denied, 498 U.S. 1068 (1991) (testimony by narcotics agent interpreting drug jargon in tape recording).

Criminal prosecutions make use of witnesses with specialized knowledge to explain criminal activity. *E.g., United States v. Valle*, 72 F.3d 210, 214-215 (1st Cir. 1995) (expert testimony on matters involving dosage, prices, and other particulars of ingestion and distribution of cocaine admissible as likely to be helpful); *United States v. Johnson*, 28 F.3d 1487 (8th Cir. 1994), cert. denied, 115 S. Ct. 768 (1995) (gang member testified as an expert on gang activity); *United States v. Locascio*, 6 F.3d 924, 936-937 (2d Cir. 1993), cert. denied, __ U.S. __, 128 L. Ed. 2d 365 (1994) (FBI agent testimony regarding structure and methods of organized crime families).

It is not essential that a witness with specialized knowledge belong to any legitimate discipline. *See, e.g., State v. Briner*, 255 N.W.2d 422 (Neb. 1977)(retired burglar

testified as an expert on the issue of whether items found in defendant's possession were burglar tools); *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978)(witness who testified that he had smoked marijuana over one thousand times and had developed the ability to distinguish marijuana from various sources, permitted to opine that the marijuana in question was from Colombia).

As Judge Kozinski noted on remand in *Daubert*, strict application of the *Daubert* factors would close the gate to a great deal of expert testimony in criminal cases. *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 43 F.3d 1311, 1317 & n.5 (9th Cir. 1995). ATLA respectfully refers the Court to the Brief of Amicus Curiae International Association of Arson Investigators, et al., setting forth the difficulties that application of *Daubert* factors would present to the prosecution of criminal cases.

Significantly, most of the amici supporting Petitioner part company with the Petitioner on this point, stating that, while *Daubert*'s gatekeeping function applies to all expert testimony, the specific *Daubert* factors do not apply in every case. *E.g.*, Brief of the United States as Amicus Curiae at 18 ("the four factors identified in *Daubert* simply provide illustrative examples of pertinent considerations"); Brief of ATRA at 22; Brief of Defense Research Institute at 18; Brief of Washington Legal Foundation at 18-19.

3. The District Court's Failure To Indicate the "Fit" Between Criteria and the Validity of Carlson's Testimony Constituted Abuse of Discretion.

Petitioner contends that unless the court applied the four *Daubert* factors, the gatekeeping function would be "essentially disabled." Pet. Br. at 20-21. ATLA suggests that precisely the opposite is true. Because the purpose of this gatekeeping function is to ensure the reliability of the proffered testimony, any indicia selected by the judge must be appropriate for that task. Arbitrarily applying the specific

Daubert factors without determining that they actually shed light on the validity of the proffered testimony short-circuits the gatekeeping function. In short, the reliability inquiry requires some "fit" between any criteria applied by the judge and reliability of the specific testimony.

On this point, ATLA agrees with the view expressed by the Solicitor General:

> Depending on the expert testimony involved, a district court's decision to apply the factors identified in *Daubert*, or not to apply those factors, could result in an abuse of discretion. The crucial question in each case is whether the district court has properly assessed the reliability of the expert's testimony in light of the fact in issue and the expertise involved.

Brief of United States as Amicus Curiae at 20-21.

The district court's ruling in this case lacked any such assessment of whether application of the *Daubert* factors would shed any light on the reliability of Carlson's opinion.

For example, because Carlson relied on his years of experience in examining failed tires, it would not appear that testing by others with differing experience would either "falsify" Carlson's method or arrive at an error rate. Nor did the district court indicate whether in the field of tire failure analysis there exist peer reviewed journals that customarily publish articles by individuals such as Carlson about how they analyze failed tires, so that lack of publication or peer review might indicate unreliability. General acceptance of Carlson's method of interpreting the characteristics of failed tires would shed little light on the reliability of Carlson's opinion because each analyst would necessarily rely on his or her own personal knowledge and experience.

In short, the district court automatically applied the *Daubert* factors without considering whether there was sufficient "fit" between those factors and the reliability of Carlson's testimony in the circumstances of this case. ATLA

submits that this rigid application of the *Daubert* factors constituted an abuse of discretion. *Cf. General Electric Co. v. Joiner*, 118 S. Ct. .512 (1997).

B. Reliability of Carlson's Application of Valid Methodology Was Subject To Cross Examination.

To state that the *Daubert* factors bore little relationship to the reliability of Carlson's expert opinion is not to say that his opinion did not raise significant reliability concerns. Petitioner complains of deficiencies in Carlson's inspection of the tire, repeated inconsistencies and mistakes in his report, and failure to account for evidence indicating abuse. Pet. Br. at 6-8 & 48-49. Indeed, Petitioner asserts that "Carlson departed significantly from his usual methodology in this case." *Id.* at 33.

The focus of these concerns is not the underlying engineering principles or Carlson's "visual inspection-process of elimination" methodology.[4]

The principle that tire abuse leaves tell-tale marks on a tire is well accepted, as the tire manufacturers' trade association states:

> Based on years of experience testing, observing, and applying scientific principles to the analysis of tire failures, certain information and basic understandings about tires have become almost axiomatic. Various forms of use and abuse lead to certain identifiable and repeatable conditions of failure. For example, when tires are run underinflated heat can build up, which ultimately can lead to failure with certain established indicia.

Brief of Rubber Manufacturers at 24 n.16. Both Carlson and Petitioner's own tire failure expert employed visual inspection of these physical characteristics. 131 F.3d at 1436 n.8.

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[4] The court found "no inherent flaw in a process-of-elimination form of proof per se." 923 F. Supp. at 1520 n.7.

Rather, Petitioner's complaints appear to focus on Carlson's application of that methodology and his analysis of the information gleaned from visual inspection. Unlike the witness who relies on out-of-court scientific principles or techniques, Carlson's specific application and analysis was amenable to cross-examination to develop these shortcomings for the jury. ATLA respectfully submits that the district court should have inquired whether the reliability of Carlson's opinion could be probed sufficiently by cross-examination and rebuttal, rather than resorting to extraneous indicia of reliability. Application of a methodology or technique in a particular instance is generally deemed a matter that goes to weight, rather than admissibility. *United States v. Bonds*, 12 F.3d 540, 561 (6th Cir. 1993); *United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994), cert. denied, 513 U.S. 1132 (1995); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042-44 (2d Cir. 1995).

II. THE RESPONSIBILITY OF FEDERAL JUDGES IN RULING ON THE ADMISSIBILITY OF EXPERT TESTIMONY IS NOT TO RESOLVE CONTESTED FACTUAL ISSUES, BUT TO ASSIST THE JURY IN DOING SO.

A. This Court Should Provide A Guideline Applicable to the Admissibility of All Expert Testimony Under Rule 702.

To state that *Daubert* requires judges to take steps to ensure the reliability of expert testimony but that the four *Daubert* factors are not necessarily or exclusively applicable leaves judges in a quandary. What guides the selection of the appropriate steps or factors to ensure reliability in a particular case? As the Solicitor General states, there is "a strong need for one general framework when evaluating the admissibility of expert testimony and evidence under Rule 702." Brief of United States as Amicus Curiae at 14.

Several amici propose that all expert testimony be gauged by comparison with the standards or methodology prevalent in the expert's particular field of discipline or with the "intellectual rigor" experts employ in practice outside the courtroom.

ATLA submits that these considerations are merely a more restrictive formulation of *Daubert*'s "general acceptance" factor. Indeed, Petitioner includes these considerations within its discussion of the general acceptance factor. Pet. Br. at 43. Comparison with the accepted knowledge or methodologies of the expert's discipline, while sometimes useful, suffers from the same limitations as the *Frye* test. Its elevation to a generally applicable criterion would essentially overrule *Daubert*'s central holding that the Frye test as a single standard did not survive the enactment of Rule 702. 509 U.S. at 589.

ATLA suggests that Congress itself has set the benchmark to guide the judge's reliability inquiry under Rule 702: To assist the trier of fact. This is, after all, the purpose of the judge's reliability inquiry. Our adversary system does not pit judges against juries. On the contrary, ATLA suggests, the judge's objective should be to ensure that the jury has a sufficient basis for an intelligent decision as to the credibility and weight of the expert's opinion.

B. Historically, Courts Have Deemed Expert Testimony Sufficiently Reliable For the Jury Where Its Foundation Is Subject to Cross-Examination or Possesses Other Indicia Of Reliability.

Common law judges traditionally ruled on the admissibility of expert testimony, reserving to the jury the task of evaluating its credibility and weight. *See* 9 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 2549 & 2550, at 639-40 (Chadbourn rev. 1981). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," this

Court has stated, "not those of the judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

> [It is] the fundamental premise of our entire system that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and when called upon to do so, to give greater credence to one party's expert witnesses than another's.

Barefoot v. Estelle, 463 U.S. 880, 902 (1983). *See also United States v. Scheffer*, 118 S. Ct. 1261 (1998).

Prior to the 20th Century, courts generally did not impose greater reliability requirements on expert testimony than on testimony from other witnesses. Jack B. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 474-75 (1986). "Traditionally, common law rules of evidence required a witness to base her expert opinions solely upon her own observations, or on explicitly stated assumptions drawn from evidence in the record." Gross, *supra*, at 1156. "Personal observation has always been an adequate basis for an expert's opinion, 'and indeed has been called the most desirable of all bases.'" Jack B. Weinstein, et al., WEINSTEIN'S EVIDENCE § 703-7 (1995) (quoting the Advisory Committee's Note to Fed.R.Evid. 703).

Because the foundation for the witness' reliability was the knowledge and experience of the witness himself, cross-examination, impeachment and rebuttal by the opposing party provided the jury with a sufficient basis for assessing the expert's credibility. At this time, "courts apparently never considered the question of whether a body of asserted knowledge existed, and could be validated, separate from the qualified expert who 'possessed' it." David L. Faigman, Elise Porter and Michael J. Saks, *Scientific Evidence After the Death of Frye: Daubert and Its Implications for Toxic Tort, Pharmaceutical, and Product Liability Cases*, 15 Cardozo L. Rev. 1799 (1994). Scientific principles were, in effect, out-of-court assertions. An expert witness could not be cross-

examined "as to what other scientific men have said . . . or in respect to the general teachings of science." *Davis v. United States*, 165 U.S. 373, 376-77 (1897).[5]

Eventually, the progress of science presented courts with the problem of experts whose opinions depended upon scientific principles or methods apart from the witness' own knowledge and experience. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), implicitly recognized that a defense expert's testimony concerning the results of an early form of polygraph essentially depended upon on an out-of-court assertion of scientific knowledge not subject to cross-examination. Hence, some other means of assuring reliability was needed as a substitute for cross-examination.

Significantly, Justice Van Orsdel did not undertake a direct inquiry into the validity of blood pressure response to lying, despite the fact that defendant argued that scientific tests supported the theory. Instead, the *Frye* court took a more indirect route. "General acceptance" of a scientific principle or methodology does not establish its reliability. It serves instead as a "surrogate" or indicator of reliability that the court deemed sufficient for the jury to assess the weight and credibility of the expert's testimony. See generally Bert Black, Francisco J. Ayala, and Carol Saffran-Brinks, *Science And The Law In The Wake Of* Daubert*: A New Search For Scientific Knowledge*, 72 Tex. L. Rev. 715, 725-34 (1994).

Although some courts applied *Frye's* general acceptance standard in rigid fashion, others recognized that different

[5] The reliability concern raised by reliance on out-of-court scientific knowledge is analogous to the hearsay problem of admitting out-of-court statements for their truth. Professor Margaret Berger, for example, suggests that judges deal with such expert opinion in much the same way they approach proffers of learned treatises under the hearsay exception, Fed. R. Evid. 803(18), treating relevant testimony as presumptively admissible unless the opponent comes Foreward with evidence of untrustworthiness. Margaret A. Berger, *Procedural Paradigms For Applying The Daubert Test*, 78 Minn. L. Rev. 1345, 1367 (1994).

indicia of reliability might be more appropriate for other types of scientific testimony. Judge Weinstein and Professor Berger, for example, proposed seven pertinent factors: (1) the general acceptance of the technique; (2) the qualifications of the expert; (3) the technique's previous uses; (4) the potential rate of error; (5) the existence of specialized literature; (6) the novelty of the invention; and (7) the degree to which the technique requires subjective interpretation by the expert. Jack B. Weinstein & Margaret A. Berger, 3 WEINSTEIN'S EVIDENCE ¶ 702[03], at 702-18 (1987). Justice McCormick suggested 11 factors. Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879, 911-12 (1982). One group of scholars identified some 20 different factors employed by courts as surrogate indicators of reliability. Black, et al, *supra* at 733-34 & n.114.

The Court in *Daubert* held that Congress did not incorporate the *Frye* standard into the Federal Rules of Evidence. "[A] rigid general acceptance requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'" 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). At the same time, however, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. 509 U.S. at 589. As the Court subsequently stated, "the Federal Rules of Evidence . . . leave in place the 'gatekeeper' role for the trial judge in screening such evidence." *General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997).

The Court clearly did not intend to replace the *Frye* test with the rigid application of its own four factors. What factors, then, *should* the trial judge apply? ATLA suggests that judges should be guided by the benchmark set in Rule 702. Courts should identify those indicia of reliability that will provide the jury with what it needs to make an intelligent

decision as to the proper credibility and weight of the expert's opinion.

C. The Judge's Role As Gatekeeper Is To Assure That Expert Opinion Bears Sufficient Indicia Of Reliability To Assist The Jury In Determining Its Weight And Credibility.

In enacting the Federal Rules of Evidence, Congress

> produced an enormous loosening up of the restrictions on the admission of expert testimony, on its basis, on its form, and on the effective utilization of such testimony once admitted. This relaxation was needed to give the trier of fact convenient access to the reliable technical knowledge that is available in our modern society.

Jack B. Weinstein, *Improving Expert Testimony*, 20 U. Rich. L. Rev. 473, 482 (1986).

This "loosening up" represents an informed vote of confidence in the ability of American juries to make proper use of expert testimony. The purpose of the Rules was to remove "a heavy and suffocating layer of technicalities wholly inconsistent with the simple facts of life and the intelligence of American jurors." Rules of Evidence, Hearings Before the Special Subcom. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 87-88 (1973)(Statement of Albert Jenner, Chairman of the Advisory Committee on the Rules of Evidence).

Significantly, the *Daubert* factors, offered as "general observations," are not framed as rules of exclusion. For the most part, the Court did not describe these considerations as yes-no tests of admissibility, but instead spoke in terms of degree, the hallmark of matters that go to the weight of the evidence for the jury.

For example, the Court did not identify a specific "error rate" as a ceiling, beyond which an expert's opinion would be disqualified. Providing the error rate of a particular

methodology would assist the jury in assessing the weight of the expert's opinion.[6] The Court described "publication (or lack thereof) in a peer reviewed journal" as "a relevant, though not dispositive, consideration." 509 U.S. at 594. Similarly, the Court indicated, evidence of "a particular degree of acceptance" in the relevant scientific community, is permissible, though not required. *Id.*

The Court's discussion suggests that where expert opinion rises above the threshold of mere "subjective belief or unsupported speculation," *Id.* at 590, the judge's focus should be on selecting indicia of reliability that will provide the jury with a basis for intelligently deciding whether and to what extent to credit the expert's opinion. As the Court explains:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Id. at 596.

III. RELEVANT TESTIMONY FROM A QUALIFIED EXPERT IS PRESUMPTIVELY ADMISSIBLE.

A. Broad Admissibility of Expert Testimony is Consistent with the Right to Trial by Jury, the Rules Enabling Act, and the Liberal Thrust of the Rules Themselves.

Applying the jury-centered guideline described above, ATLA submits that relevant testimony by a properly qualified expert should be presumptively admissible, unless the opponent demonstrates that the opinion has no reliable basis and is mere speculation or subjective belief. Judges should use the means at their disposal to assure that the jury is equipped

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[6] Generally, the accuracy of scientific testing is "addressed through determination of the weight to be accorded the testimony, rather than through the threshold determination of admissibility." *Fierro v. Gomez*, 865 F. Supp. 1387, 1395 n.7 (N.D. Cal. 1994).

to make informed assessments of an expert's opinion. In some cases, reliability can be probed through cross-examination and rebuttal of the witness. In other cases, the judge may look to the presence or absence of indicia of reliability that will assist the jury. The trial judge might also use other means of assisting the jury in its task, including special instructions, allowing juror notetaking and questioning of witnesses, and other devices.

This Court's decisions under the Rules have consistently upheld the Rules' preference in favor of broad admissibility of scientific evidence and confidence in the jury's ability, aided by cross-examination and the adversarial process, to carry out its factfinding function. *See e.g., Rock v. Arkansas*, 483 U.S. 44, 61 (1987). In *Daubert*, the Court recognized the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." 509 U.S. at 588, quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988). *Compare* Rules 803(6) and 803(8), providing exceptions to the hearsay rule for business records and public records "unless the sources of information or other circumstances indicate lack of trustworthiness."

Professor Berger has concluded that scientific expert testimony "should be presumed to be admissible until the opponent discharges its burden to show the contrary." She reasoned that:

> the evidentiary policies underlying *Daubert*'s competing rationales, efficiency and fairness concerns, and the structure of the discovery rules, all dictate placing a burden on the opponent of the evidence to make a prima facie showing that the proponent's evidence suffers from the deficiencies identified in *Daubert*, before the court has any obligation to undertake an admissibility determination.

Margaret A. Berger, *Procedural Paradigms For Applying The Daubert Test*, 78 Minn. L. Rev. 1345, 1367 (1994). Indeed, the amicus brief submitted by a group of engineering

professors recommends precisely this presumption. See Amicus Brief of John Allen, et al. at 20.

To hold otherwise, requiring the district court to conduct a reliability inquiry whenever a party utters a *Daubert* objection to a proposed expert, would invite abuse. A full-scale *Daubert* hearing can be an expensive proposition, involving the transportation and court time of the testifying expert, accompanied by supporting documentation and -- not infrequently -- supporting experts. A party should not be permitted to spend an opponent into a disadvantageous settlement or to deter individuals from pursuing their legal rights in the first place, by imposing unnecessary expense in the absence of evidence of genuine reliability concerns.

Such a presumption in favor of admissibility also comports with the preservation of the constitutional role of the jury.[7] Within that constitutional mandate:

> It is the jury, not the court, which is the factfinding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. . . Its function is to select among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter cannot be ignored.

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> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii. The "jury's core function of making credibility determinations" is also a "fundamental premise of our criminal trial system." United States v. Scheffer, 118 S.Ct. 1261, 1266 (1998).

Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944). "[B]ecause the federal courts operate under the strictures of the Seventh Amendment," this Court has stated, "we are reluctant . . . to take steps which ultimately might interfere with the proper role of the jury." *Browning-Ferris, Indus. v. Kelco*, 492 U.S. 257, 279 n.26 (1989).

An unduly rigorous exercise of the judge's gatekeeping function, "elevating judges to the role of St. Peter at the gates of heaven" in one court's memorable phrase, "would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1045 (2d Cir. 1995). *See also Ambrosini v. Labarraque*, 101 F.3d 129, 133 (D.C. Cir. 1996)("When a court denies the right to have a jury decide a disputed issue, especially one of a scientific nature, its reasons for doing so must be strong."). As this Court has cautioned:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1953).

Such vigilance is necessary to avoid "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway v. United States*, 319 U.S. 372, 407 (1943)(Black, J., dissenting).

This Court has also emphasized that interpretations of the Federal Rules must be mindful of the mandate of the Rules Enabling Act that the rules, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. *See, Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2244 (1997)(Fed. R. Civ. Pro. 23).

It is a fact of our justice system today that "in many sorts of civil litigation, the plaintiffs cannot satisfy their burden of proof without scientific evidence." Margaret A. Berger, *supra*, at 1348. This is particularly true in product liability actions where, as in the case at bar as well as in *Daubert*, exclusion of plaintiff's expert testimony can conclusively determine the outcome of the case.[8] In this manner, construction of a procedural rule of evidence may affect substantive rights under state tort law.

A striking example is the contention of Petitioner and some supporting amici that, under *Daubert*'s "testability" factor, an expert who would testify that a product could be made safer should be required to produce a testable alternative design. Whether state substantive product liability law should require plaintiffs to prove reasonable alternative design is a matter of sharp controversy. *See* Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 Tenn. L. Rev. 1407 (1994)(arguing that the reasonable alternative design requirement currently considered by the American Law Institute is not supported by the majority of case law). Although alternative design is not an issue in this case, Petitioner and amici appear to be engaged in an attempt to impose such a requirement in products cases through interpretation of Rule 702.

B. Arguments Against Broad Admissibility of Expert Opinion are Baseless and Misdirected.

Petitioner and supporting amici advance a number of policy arguments against broad admissibility of expert

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[8] It is also a fact of life that in any given field of science, many of the qualified experts are employed by, or are engaged in research funded by manufacturers or corporations who are frequent defendants in such litigation. As one court has recognized, undue restrictions on expert testimony place an especially onerous burden on injured plaintiffs, who do not have access to the numbers of experts available to manufacturers. *Knight v. Otis Elevator Co.*, 596 F.2d 84, 88 (3d Cir. 1979).

testimony, some urging even greater restriction. See Brief American Automobile Manufacturers at 5. ATLA submits that these argument have little basis in fact. Moreover, the issues they raise are better addressed by other means than through limiting expert testimony under Rule 702.

1. Fear of Dishonest Experts.

Petitioner and several amici raise the specter of "hired gun" experts who may skew their testimony in the direction of their financial interests, or even lie. No empirical data is offered to support this assertion, and some researchers doubt that dishonest experts are a significant problem. See, e.g., Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, at 1120.

To the extent that the problem exists, however, it is not a matter of invalid science, but of venal scientists. The responsibility for assessing the credibility of interested or potentially dishonest witnesses, expert or lay, lies squarely with the jury.[9]

2. Fear of Infallible Experts

Petitioner and some amici also complain that expert witnesses are clothed with an "aura of infallibility" in the eyes of naive jurors. Again, no hard evidence is cited in support of this theory. Rule 702 is premised on the contrary and better supported view. As Albert Jenner, Chairman of the Advisory Committee on the Rules of Evidence explained to Congress:

> As practical and experienced trial lawyers, we knew and, in fact have long known that intelligent jurors realize that an expert is only stating his opinion, that his testimony is to be treated as an opinion and is not binding upon the

[9] The justice system also has a variety of self-defense mechanisms, including criminal penalties for perjury and subornation of perjury, as well as professional sanctions against attorneys who would introduce false testimony. *See* State v. Sullivan, 130 A.2d 610 (N.J. 1957)(sustaining conviction of doctor for perjury as medical expert witness).

> jurors and is to be judged in the light of all the evidence in the case, to be accepted or rejected by a juror as he sees fit.

Rules of Evidence, Hearings Before the Special Subcom. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 87-88 (1973).

Nor does Petitioner's argument make sense in the common situation, including this case, where expert testimony is opposed by an expert for the opposing party, so that it is clear that both experts cannot be infallible.

Moreover, a number of empirical studies have found "that expert testimony has some impact on jury decisionmaking but that the effects are moderate by comparison to other types of evidence." Gross, supra, at 1179. *See also* Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 Law & Contemp. Pblms. 177, 189 (1989) (In experimental studies using mock jurors "the presentation of scientific evidence was not ignored, nor did it overwhelm other factors in jurors' judgments.").

Finally, the Rules already address the problem of testimony that is likely to be misleading or confusing to the jury. As this Court pointed out in *Daubert*, such testimony is subject to exclusion under Rule 403. 509 U.S. at 595.

3. Fear of Incompetent Juries

The underlying premise of Petitioner's and supporting amici is that juries are simply incompetent to deal intelligently with expert testimony. Once again, Petitioners cite no empirical evidence to support its dim view of Americans who sit on juries.[10]

[10] Petitioner's sole item of empirical evidence is a National Law Journal survey which concluded that many jurors found testifying experts to be credible and affected their verdicts. Pet. Br. at 24. The study does not suggest either that experts mislead jurors or that the jurors were misled.

In recent years it has become disturbingly fashionable, particularly among those with a financial interest in rewriting tort law in their favor, to engage in what can only be called "jury bashing." Ordinary Americans from all backgrounds and walks of life, the argument goes, suddenly become intellectual children when they enter the jury box, unable to understand the evidence put before them and deciding cases on the basis of emotion.

Such attacks are based almost entirely on anecdotal stories and "lack substantial empirical bases." *Developments in the Law – the Civil Jury*, 110 Harv. L. Rev. 1489, 1511 (1997). Indeed, the only support Petitioner could muster for the primary contention in its brief, that jurors perform badly when dealing with technology, is a bald assertion that it is "common knowledge." Pet. Br. at 24.

Petitioners' notion that "lay" jurors cannot deal with scientific evidence hardly advances their case. Judges are "lay" persons as well, and there is no inherent reason to believe that the lay person on the bench is more capable at dealing with scientific issues than the lay persons in the jury box.

A succession of empirical studies has found that judges typically agree with the verdicts of juries and that disagreements tend not to be associated with apparent evidentiary difficulty, or with the use of expert witnesses. *See* Harry Kalven, Jr. & Hans Zeisel, THE AMERICAN JURY (1966); Martha A. Myers, *Rules Departures and Making Law: Juries and Their Verdicts*, 13 Law. & Soc. Rev. 781 (1979); Valerie. Hans & Neil. Vidmar, JUDGING THE JURY 131-64 (1986); Neil Vidmar, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS AWARDS 175-182 (1995). .

Indeed, as one trial judge states:

> I would prefer to have a jury of twelve make the call on the scientific issue. . . . I know from having questioned prospective jurors on the subject during voir dire examination, and from having discussed it with sworn jurors after they have been excused, that jurors also are often distrustful of expert witnesses. . . . My intuition is the jury, taken as a whole, is typically a great deal more knowledgeable about science than the judge. In any group of twelve jurors who have survived the selection process, there is likely to be at least one juror who has a far better understanding of the scientific issue than the judge.

Ronald W. Tochterman, Daubert: *A (California) Trial Judge Dissents*, 30 U.C. Davis L. Rev. 1013, 1019 (1997).

As in *Daubert*, Petitioner is "overly pessimistic about the capabilities of the jury and of the adversary system generally." 509 U.S. at 596. *See also Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)("Petitioner's entire argument . . . is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.")

This Court's confidence -- and that of the constitutional framers -- is well placed. Recent empirical studies "strongly rebut[] the broad assumption that jurors are not competent to understand complicated scientific evidence." Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity,"* 25 Conn. L. Rev. 1083, 1090, 1094-98 (1993).

Summariz[illegible] five recent social science research projects concerning "ju[illegible]competence in ordinary trials," Joe S. Cecil, Project Director in the Division of Research at the Federal Judicial Center, and Valerie P. Hans, Professor of Criminal Justice and Psychology at the University of Delaware, concluded that "doubts about jury competence expressed by jury critics stand in sharp contrast to the judgments of

scholars who conduct research on jury decisionmaking." Joe S. Cecil, Valerie P. Hans, and Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 728, 744-45 (1991). To the contrary, "empirical evidence consistently points to the general competence of the jury" in such ordinary cases. *Id.* at 745.

Indeed, a Federal Judicial Center study constituting "the first, and to date only, systematic examination of reported performance of jurors across a substantial number of demanding civil trials," concluded that "the overall picture of the jury that emerges from available data indicates that juries are capable of deciding even very complex cases." *Id.* at 764.

ATLA respectfully recommends to this Court the Brief Amicus Curiae of Neil Vidmar et al., in which a group of highly qualified professors and researchers set forth detailed and compelling empirical evidence demonstrating the competence of juries.

D. Courts Possess Other Means Of Ensuring Reliability Short Of Exclusion.

Where the ability of jurors to comprehend and evaluate expert testimony is a matter of concern in a particular cases, judges should make use of the wide variety of devices that may aid the jury in carrying out its task.

Potentially helpful devices include tailoring the form and timing of the court's instructions to make them more accessible and useful; permitting jurors to ask questions of witnesses; allowing notetaking by jurors, and other aids. *See generally, Developments in the Law: The Civil Jury*, 110 Harv. L. Rev. 1408, 1503-11 (1997); Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, Federal Lawyer 20, 23-24 (June 1997). In short, exclusion of evidence should be the last, not the first resort.

* * *

Daubert did not require judges to become amateur scientists, nor professional jurors. The objective of the judicial gatekeeping function should not be to prevent the jury from hearing difficult expert testimony. Rather judges should focus on assisting the jury in carrying out its constitutional responsibility.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., NW
Washington, DC 20007
(202) 965-3500

Counsel for Amicus Curiae:
The Association of Trial Lawyers of America

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